



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**FEB 14 2018**

RE: MUR 7123 (Jay Inslee for Washington)

Dear Mr. Svoboda & Ms. Weisman:

On August 16, 2016, the Federal Election Commission notified your client, Jay Inslee for Washington, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 8, 2018, the Commission voted, on the basis of the information in the complaint and the response submitted by your client, to dismiss the allegation that your client violated 52 U.S.C. § 30125(f)(1). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003), and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

If you have any questions, please contact Shanna M. Reulbach, the attorney assigned to this matter, at (202) 694-1638.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn Y. Tran", with a long horizontal flourish extending to the right.

Lynn Y. Tran  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Jay Inslee for Washington MUR: 7123

**I. INTRODUCTION**

This matter was generated by a Complaint filed with the Federal Election Commission (the "Commission") by the Washington State Republican Party. The Complaint alleges that Jay Inslee for Washington (the "Committee"), a non-federal Washington State candidate committee, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by disbursing non-federal funds on a 30-second television advertisement attacking or opposing then-presidential candidate Donald J. Trump. Based on the available information, described in detail below, the Commission dismisses as a matter of prosecutorial discretion the allegation that the Committee violated 52 U.S.C. § 30125(f)(1) by spending soft money on the advertisement, pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), and closes the file.

**II. FACTUAL BACKGROUND**

In 2016, Jay Inslee served as the Governor of the State of Washington and was running for re-election. Inslee's gubernatorial campaign committee disbursed funds to air a 30-second television advertisement entitled "Team" that supported Inslee's election over opponent Bill Bryant.<sup>1</sup> The advertisement reportedly began airing in the Seattle/Tacoma television market on August 2, 2016.<sup>2</sup> Based on the Committee's state disclosure reports, it appears that the

<sup>1</sup> Jay Inslee for Washington, "Team," YOUTUBE, <https://www.youtube.com/watch?v=SSsHNXJXJV4> (posted July 29, 2016) ("Team"); *see also* Compl. ¶ 4 (Aug. 11, 2016); Resp. at 1 (Jan. 13, 2017).

<sup>2</sup> Compl. ¶ 3.

Committee spent a maximum of \$163,288.90 on producing and airing the advertisement.<sup>3</sup> The following chart contains the narration of the advertisement and the second at which each frame began and ended:

Narration	Seconds
Paid for by Jay Inslee for Washington, Democrat.	0-3
False attacks against Jay Inslee from Bill Bryant and Republicans.	4-8
The truth? Jay Inslee successfully pushed for reforms to mental health care and strengthened security measures at state hospitals.	9-16
Jay Inslee's endorsed by sheriffs, police, and state troopers across Washington.	17-22
And who's on Republican Bill Bryant's team?	23-25
We all know who Bill Bryant's supporting for President.	26-30

In the final five-second frame, an image of Trump appeared on the screen beside an image of Bryant.<sup>4</sup> Text on the screen stated: "Bill Bryant and Donald Trump Wrong for Washington."<sup>5</sup>

The Complaint alleges that the Committee violated 52 U.S.C. § 30125(f)(1) by spending non-federal funds on this advertisement because it was a public communication that attacked or opposed Trump, a clearly identified candidate for federal office.<sup>6</sup> The Committee responds that the advertisement did not attack or oppose Trump.<sup>7</sup> According to the Committee, the advertisement was directed at defeating Bryant, and Trump appeared in the advertisement only to associate Bryant with Trump.<sup>8</sup> The Committee argues that, "[i]n its context, the 'Wrong for

<sup>3</sup> The Inslee Committee disclosed a \$150,000 disbursement on July 28, 2016, for the purpose of "TV advertising," and five smaller disbursements on August 2, 2016, for the purpose of "TV production." *Expenditures for: Inslee Jay R*, PUB. DISCLOSURE COMM'N, <http://web.pdc.wa.gov/MvcQuerySystem/CandidateData/expenditures?param=SUSTTEogIDExMA%3D%3D%3D%3D&year=2016&type=statewide> (last visited Nov. 6, 2017). There were gaps in the Committee's television-related spending before and after this timeframe, allowing us to conclude that the disbursements for the advertisement at issue were likely contained within this amount. *See id.*

<sup>4</sup> Team, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> Compl. ¶¶ 1-2, 8-14.

<sup>7</sup> Resp. at 2.

<sup>8</sup> *Id.* at 2-3.

1 Washington' chyron conveyed that Mr. Bryant and Mr. Trump's mutual embrace was reason to  
2 vote against Mr. Bryant."<sup>9</sup>

3 The Committee also argues that section 30125(f)(1)'s legislative history and Commission  
4 precedent establish that non-federal committees may use soft money to pay for advertisements  
5 that show that a non-federal candidate identifies with the positions of a federal candidate,  
6 because such advertisements do not actually support or oppose the federal candidate.<sup>10</sup> The  
7 Committee then asserts separately that, even if its advertisement opposed Trump, it had enough  
8 federally permissible funds in its account to pay for the advertisement without using soft  
9 money.<sup>11</sup>

### 10 III. LEGAL ANALYSIS

11 The Act prohibits a candidate for state or local office, a state or local officeholder, or the  
12 agent of a state or local candidate or officeholder from spending funds on public communications  
13 that refer to a clearly identified candidate for federal office and that promote, attack, support, or  
14 oppose ("PASO") a candidate for that office, unless the funds are subject to the limitations,  
15 prohibitions, and reporting requirements of the Act.<sup>12</sup> The Act and regulations specify that a  
16 communication may PASO a candidate regardless of whether the communication expressly

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<sup>9</sup> *Id.* The Committee contends that the "brevity" of the advertisement's "reference to Mr. Trump" helps clarify the advertisement's singular purpose of electing Inslee and further supports a no-reason-to-believe finding. *See id.* at 3.

<sup>10</sup> *Id.* at 2 & 3 n.11 (citing Advisory Op. 2003-25 (Weinzapfel), MUR 6113 (Hollingsworth), and MUR 6019 (Caserta)).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> 52 U.S.C. § 30125(f)(1), *cross-referencing id.* § 30101(20)(A)(iii) (including PASO communications in the definition of "federal election activity" ("FEA")); *see also* 11 C.F.R. §§ 100.24(b)(3), 300.71 (requiring federal funds for PASO communications). Public communications are not FEA, however, and thus are not included within the restrictions of section 30125(f)(1), if they are in connection with an election for state or local office and refer only to the candidates for such state or local office, and do not PASO any candidate for federal office. 52 U.S.C. § 30125(f)(2); 11 C.F.R. § 300.72.

1 advocates a vote for or against a candidate,<sup>13</sup> but do not otherwise define the terms promote,  
2 support, attack, or oppose.<sup>14</sup>

3 If an advertisement is a PASO communication, the Committee is required to pay for it  
4 with federal funds.<sup>15</sup> Consistent with Washington state law, the Committee appears to have  
5 accepted funds from federally-prohibited sources and in sums that exceed the Act's amount  
6 limitations.<sup>16</sup> In analyzing other federal-funds restrictions in section 30125, the Commission has  
7 allowed a state committee to use a "reasonable accounting method" to separate permissible from  
8 impermissible funds in order to determine whether federally permissible funds were used to  
9 make a particular disbursement.<sup>17</sup> The Committee here does not address whether it used a  
10 reasonable accounting method; it states only that publicly filed reports "show[ ] that it received

<sup>13</sup> 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3).

<sup>14</sup> The Commission has twice proposed but not adopted definitions for PASO. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. 35,654, 35,681 (May 20, 2002) (Notice of Proposed Rulemaking); Coordination, 74 Fed. Reg. 53,893, 53,898-900 (Oct. 21, 2009) (Notice of Proposed Rulemaking).

<sup>15</sup> *See* 11 C.F.R. § 300.71 (requiring federal funds for PASO communications); *see also id.* § 300.2(g) (defining "federal funds" as those that "comply with the limitations, prohibitions, and reporting requirements of the Act").

<sup>16</sup> *See Jay Inslee, 2016*, PUB. DISCLOSURE COMM'N, [https://www.pdc.wa.gov/browse/campaign-explorer/candidate?filer\\_id=INSLJ%20%20110&election\\_year=2016](https://www.pdc.wa.gov/browse/campaign-explorer/candidate?filer_id=INSLJ%20%20110&election_year=2016) (last visited Nov. 6, 2017) ("Jay Inslee, 2016 Database") (showing on the downloadable list of contributions, for example, contributions received from "Centene Corporation" on July 18, 2016, and from "UFCW Local 367" on July 28, 2016, and a \$290,000 contribution from the Washington State Democratic Central Committee on July 28, 2016); *2016-17 Contribution Limits*, PUB. DISCLOSURE COMM'N, Jan. 29, 2016, [https://www.pdc.wa.gov/sites/default/files/campaign-contribution-limits/LimitsChart\\_0.pdf](https://www.pdc.wa.gov/sites/default/files/campaign-contribution-limits/LimitsChart_0.pdf) ("Washington Contribution Chart") (summarizing who may make contributions and stating the contribution limits for each contributor category); *see also* 52 U.S.C. § 30118(a) (prohibiting corporate and labor organization contributions to federal candidates and committees); *Contribution Limits*, FEC, <https://transition.fec.gov/info/contriblimitschart1718.pdf> (last visited Nov. 6, 2017) (stating that a state party committee may contribute up to \$5,000 to a candidate committee).

<sup>17</sup> Advisory Op. 2006-38 (Casey State Committee) at 3-4; Advisory Op. 2007-26 (Schock) at 3, 5; *see also* 11 C.F.R. § 110.3(c)(4) (providing a basis for the Commission's just-cited advisory opinions by stating that committees may transfer funds in certain situations when they can demonstrate that their "cash on hand contains sufficient funds at the time of the transfer that comply with the limitations and prohibitions of the Act to cover the amount transferred"). These advisory opinions concern the federal-funds restrictions at 52 U.S.C. § 30125(e)(1)(B), which apply to certain activities by federal candidates (and federal candidates' state committees) in non-federal elections.

1 ample funds [ ] from federally-permissible sources and in federally-permissible amounts with  
2 which to pay for the ad.”<sup>18</sup> Our review of the Committee’s state disclosure reports confirms the  
3 Committee’s assessment that it appears to have had sufficient funds subject to the limitations and  
4 prohibitions of the Act on hand to pay for the advertisement.<sup>19</sup> However, those funds were not  
5 subject to the reporting requirements of the Act, and thus do not constitute federal funds.<sup>20</sup>

6 The Commission, though, has never found a 52 U.S.C. § 30125(f)(1) violation based  
7 solely on the fact that the funds a committee used to pay for a PASO communication were not  
8 subject to the Act’s reporting requirements.<sup>21</sup> Regardless of whether the Committee’s  
9 advertisement was a PASO communication, because the Committee appears to have had enough  
10 funds that complied with the limitations and prohibitions of the Act to fund the advertisement,  
11 the Commission dismisses the alleged 52 U.S.C. § 30125(f)(1) violation against the Committee  
12 as a matter of prosecutorial discretion under *Heckler v. Chaney* and closes the file.<sup>22</sup>

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<sup>18</sup> Resp. at 3.

<sup>19</sup> From July 1, 2016, through August 2, 2016—the latest date the Committee appears to have made disbursements for airing the advertisement that cost, at most, \$163,288.90—the Committee raised a total of \$843,214.72, of which \$441,814.72 was from individual donors, who are permissible sources under the Act. See Jay Inslee, 2016 Database, *supra* note 16 (providing downloadable contribution data, which labels each contribution by date and type of contributor); see also 52 U.S.C. § 30116(a)(1). Moreover, because Washington’s \$2,000 individual contribution limit is lower than the Act’s individual contribution limit, all of these reported contributions appear to be within the amount limitations of the Act. Compare Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 80 Fed. Reg. 5,750, 5,752 (Feb. 3, 2015) (providing that the individual contribution limit for the 2015-2016 election cycle was \$2,700 per election), with Washington Contribution Chart, *supra* note 16. Thus, the Committee appears to have had over \$163,288.90 of funds subject to the limitations and prohibitions of the Act on hand when it made the relevant disbursements.

<sup>20</sup> See 11 C.F.R. § 300.2(g); Factual & Legal Analysis (“F&LA”) at 5, MUR 6019 (Caserta) (concluding that funds not subject to the reporting requirements of the Act are not federal funds under 11 C.F.R. § 300.71, but dismissing the alleged 52 U.S.C. § 30125(f)(1) violation as a matter of prosecutorial discretion because of the minimal amount used for the PASO communication).

<sup>21</sup> See F&LA at 5, MUR 6019 (Caserta).

<sup>22</sup> 470 U.S. 821.